IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

— *against* —

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

— *against* —

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSER and MARVIN D. CRISTENFELD, Commissioners of Elections for Nassau County.

Respondents.

BRIEF FOR RESPONDENTS, WILLIAM D. MEISSER AND MARVIN D. CRISTENFELD, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY, NEW YORK.

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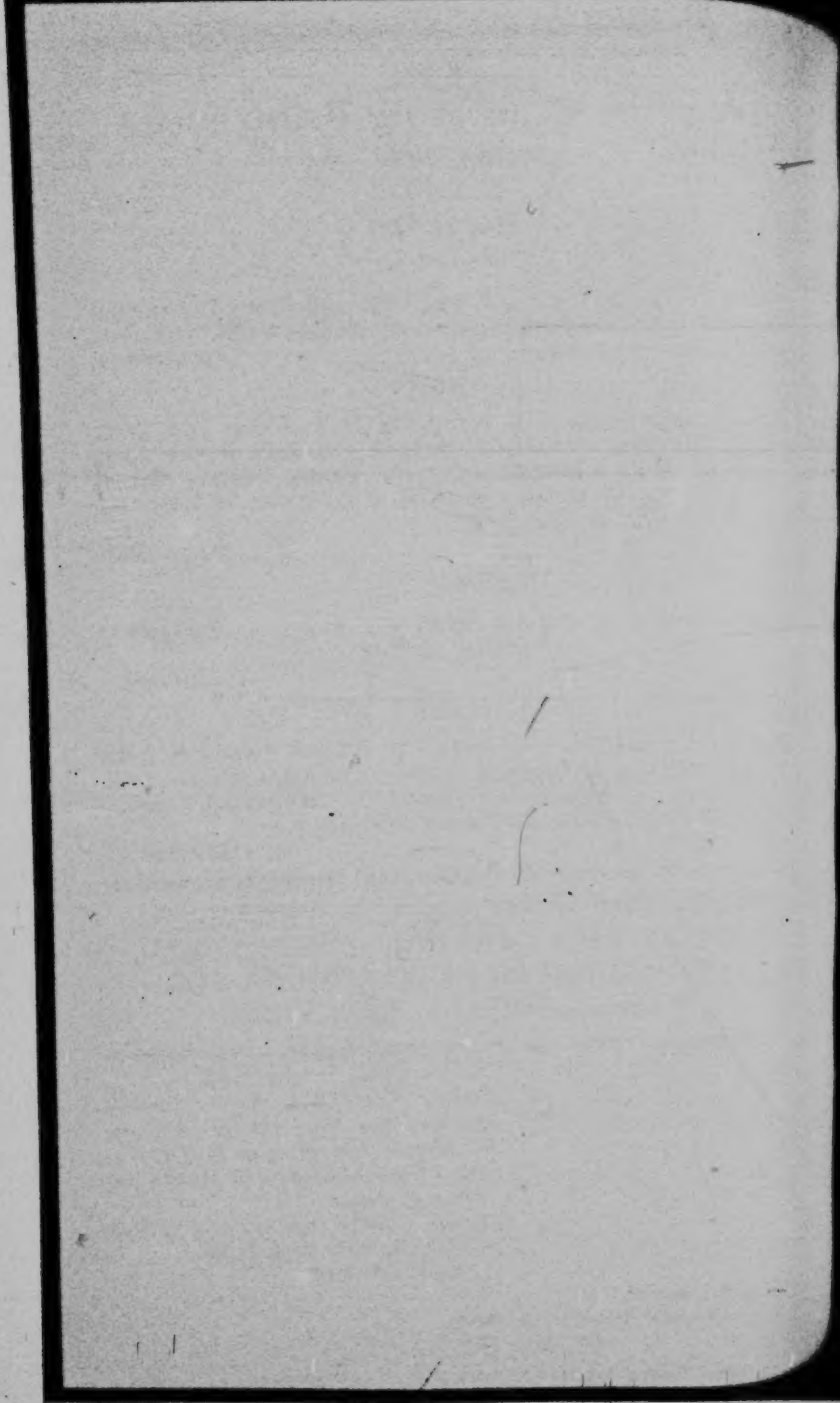

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statutory Provisions Involved

NEW YORK STATE ELECTION LAW §186 & §187.

§186. Opening of enrollment box and completion of enrollment.

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened

nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

§187. Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may

enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.

2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling.

3. A voter so desiring to enroll shall file, within the times specified in subdivision one of this section, with the board of elections of the county in which he resides, his affidavit setting forth substantially the following: the county and the city or town in which he resides, the election district, the ward or assembly district, if any, and the street and number, if any, of such residence; a statement that he is, or will be, a qualified voter of the election district stated at the next general election; the name of the party with which he desires to enroll and a statement that he is in general sympathy with its principles and intends to support generally its nominees at such elections;

a statement that he is not enrolled and the reason therefor which shall be one of those set forth in clauses (a), (b), (c), (d), (e), (f) or (g) of subdivision two. A voter desiring so to enroll whose status falls into any of the classifications set forth in any of such clauses, except those in clauses (d), (e) and (f), shall file his affidavit in person.

4. A voter desiring so to enroll who is a new voter as defined in section one hundred fifty, shall, additionally, produce proof of literacy as provided in section one hundred sixty-eight.

5. If the voter applies for special enrollment under the classification set forth in clause (b) of subdivision two, his naturalization papers or a certified copy thereof shall be submitted to the board for inspection and his affidavit shall contain a statement that the deponent is the person named in the paper so submitted.

6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year.

7. If the voter applies for special enrollment under the classification set forth in clause (g) of subdivision two, he shall file an additional affidavit setting forth the following: a statement that he was incapacitated by illness; the nature and times of which shall be stated in an affidavit of a duly licensed physician or in a certificate from the superintendent or other person in charge of a hospital, from registering for the preceding general election in respect to a personal registration district, or from voting at the preceding general election in respect to a non-personal registration district.

8. If, after being regularly enrolled in an election district as a member of a party pursuant to the provisions of subdivision five of section one hundred fifty-four, or subdivision six of section one hundred fifty-five, or section one hundred seventy-three or section two hundred three, or section three hundred three, a voter shall move into another election district of the same county, city or village, he may have his enrollment transferred to such new district, as a member of the same party, by filing with the board of elections within the times specified in subdivision one of this section, his affidavit showing the name of the party with which he is enrolled, and the town or city, election district, and when required, the ward or assembly district, in which he is enrolled, the street address, if any, from which he was enrolled, the town or city, election district, and when required, the ward or assembly district thereof into which he has moved and the street address, if any, of his residence therein, stating that he resides in the last mentioned place and desires to have his enrollment with such party transferred thereto.

9. In a city of one hundred seventy-five thousand inhabitants or more, the voter must appear and file his affidavit in person and also answer such questions affecting his identity as the board may deem necessary. In such a case the board shall compare the voter's signature, if any, on the affidavit, with his signature on the register, or if he be unable to write, shall submit to him the questions required for an identification statement on a day of registration, and, in the city of New York shall have his answers written down in the book for identification statements for the election district of his new residence. In the city of New York, the voter, if able to write, shall sign his name in the appropriate column of the signature copy of the register to which he has moved.

10. In any case not hereinbefore in subdivisions eight and nine provided for, the board in its discretion, may require a voter applying for such transfer to appear in person and answer questions affecting his identity.

11. Such transfer of the enrollment of any voter in any year shall be made but once in such year.

12. If, after being regularly enrolled in an election district as a member of a party pursuant to the provisions of subdivision five of section one hundred fifty-four, or subdivision six of section one hundred fifty-five, or section one hundred seventy-three, or section two hundred three, or section three hundred three, a voter discovers he has made a mistake when enrolling, he may apply within the times specified in subdivision one of this section, to the board of elections of the county in which he resides, for a correction of the mistake made by him when marking his enrollment blank, by filing his affidavit setting forth substantially as follows: the name of the party with which he is enrolled, and the town or city, election district, and when required, the ward or assembly district, in which he is enrolled, the street address, if any, from which he was enrolled, a statement, substance, that his current enrollment blank was cross marked X in a circle under the name and emblem of a party but that such marking was done by mistake and that he did not intend to enroll with that party; the name of the party with which he did intend to enroll and which he desires to be substituted on the register for the one opposite his name; a statement that he has been duly and regularly enrolled with the party whose name he desires substituted for at least five years immediately preceding the enrollment at which such mistake occurred, specifying the county or counties and the addresses at which he resided where he was enrolled; that he is in general sympathy with the principles of the party with which he requests to be enrolled and intends

to support generally its nominees at the next primary and general election, and that he has not participated in any primary election or convention of any party other than with which he requests to be enrolled during such period of five years, or since. If, for any such period, the registers or enrollment books in the office, of such board do not show the applicant to have been enrolled therein with the party with which the applicant requests to be enrolled, the board shall require the applicant to produce a certified transcript of his enrollment with such party elsewhere within the state accompanied with proof, by affidavit, showing his identity with the person whose name appears in such transcript.

13. Except where a voter is expressly required under subdivisions two, three, four, five, six, seven, eight, nine, ten or twelve of this section to file his affidavit in person or to appear in person, his affidavit required under any of such subdivisions may be filed either in person or by agent or sent by mail. Mailing within the state and within the times prescribed for filing shall be sufficient, if the affidavit be received by the board. The postmark shall be sufficient proof of the date of mailing. If mailed outside of the state, the affidavit must be received by the board within the times so prescribed for filing.

14. The board shall prepare forms for the various affidavits required under this section and, upon application, shall furnish a copy of the appropriate form to or for any voter desiring to use the same, and an additional copy if required. Copies also may be sold by the board, at cost, to any qualified voter.

Brief For Respondents, William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections For Nassau County, New York

The decision of the United States District Court for the Eastern District, Chief Judge Jacob Mishler presiding, has not yet been officially reported; it is reproduced in the Appendix at 21-45. The denial, by Chief Judge Mishler, of the respondents' application for reargument has not been officially reported. It is reproduced in the Appendix at 49-56. The reversal of the District Court's decision by the United States Court of Appeals for the Second Circuit is reported as *Rosario et al.* v. *Rockefeller, et al.*, 458 F. 2d 649. It is also reproduced in the Appendix at 69-73.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Do the New York State's political party enrollment statutes unconstitutionally abridge the petitioners' right to vote in a primary election?

Registration and Enrollment in New York State

The issue before this Court concerns the question of what requirements may be set for an individual who wishes to enroll in a political party. Under New York's system of permanent personal registration and enrollment, New York residents follow two separate and distinct procedures for registration and for enrollment; there being as a prerequisite for enrollment the requirement that an individual be registered to vote. New York has adopted as of 1967,

permanent personal registration, Election Law §350. Under this system an individual, once he has registered, keeps such registration effective so long as he votes in the general election at least once every two years. Election Law §352.

Registration is available via three methods:

(1) Central registration (Election Law §355), which is available at the Central Board of Elections during regular office hours for approximately nine months every year.

(2) Local Registration Law (§§365-368,) which provides the opportunity to register, at each polling place throughout the County, on at least two days each year and on four days during Presidential years.

(3) Absentee registration (Election Law §117-a.) which allows an individual, who expects to be absent from the County on Local Registration days, to register to vote up to 30 days prior to the general election, via the United States mails.

Enrollment in a political party occurs after an individual has registered to vote. He must complete a party enrollment blank (Election Law §174); entering on it his choice of the political party with which he wishes to affiliate himself by "solemnly declaring" himself to be "in general sympathy with the principles of the party" which he has designated. A political party is defined as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for governor." (Election Law §2(4)). New York State has four political parties under this statute: Conservative, Democratic, Liberal and Republican. An individual may decline to enroll in a political party and he will thereafter be listed as "blank". Once an individual has completed his enroll-

ment blank, such blank is ordinarily placed in a sealed box and not opened until the Tuesday following the next general election (Election Law §186). This process is known as "delayed" or "deferred" enrollment. An individual does not become officially affiliated with a party, however, until his name is formally entered on the enrollment book; since, however, such listing must be completed by the following February 1st, there is no impediment to the individual by said listing as no activities requiring party enrollment take place during such time.

This system has exceptions to the principle of delayed enrollment. These exceptions, known as special enrollment (Election Law §§187, 388), are designed to allow the immediate full participation in party affairs to certain classes. A person is eligible for special enrollment upon:

1. Attaining voting age after the preceding general election.

2. Becoming a naturalized citizen by ninety (90) days prior to the preceding general election.

3. Being a member of (or a spouse, child or parent residing with an individual who is a member of) the armed forces at all previous times to enrollment.

4. Being an inmate or patient of a veterans hospital located outside of New York, or a spouse, child or parent accompanying such patient.

5. Being physically incapacitated during the previous enrollment period.

6. Not having the necessary residential qualifications for enrollment in the preceding year—such qualifications being: a resident of the State and of the County, City or Village for three months next preceding an election. This last provision is limited to those who had resided during the preceding year within the same county in which they now desire to enroll.

(Summary of Election Law §187, §388).

Throughout 1971, a period when each of the petitioners, Pedro J. Rosario, William J. Freedman, Karen Lee Gottesman and Steve Eisner, first became eligible to vote, special enrollment was available to them*. Each petitioner, therefore, could have easily availed himself or herself of this opportunity and as a result would have been eligible for participation in the June 1972 primary. It should be noted that an individual does not have to be of voting age at the time of registration — rather, he merely must demonstrate that he will be of voting age on Election Day, so that each petitioner could have registered.

In 1971, Nassau County began the year with 635,390 registered voters. During the year 54,141 individuals registered via central registration, 32,669 of whom were eligible for special enrollment. The remaining 21,472 fell under the operation of delayed enrollment. Following the September 14, 1971 primary election, 47,219 persons registered to vote on the three days of local registration. Since this was the post-primary period, there was no need by any of these 47,219 persons to enroll in a political party. During 1971, therefore, only 21,472 individuals were directly affected by delayed enrollment out of a total of 736,750 voters who ultimately completed the process of registering and enrolling to vote during 1971.

The foregoing statistics also demonstrate that over 100,000 Nassau County voters registered for the first time during 1971 in Nassau County (54,141 voters during central registration and 47,219 voters during local registration). If petitioner Eisner had joined his over 100,000 fellow Nassau County residents in registering and enrolling during 1971, he would not have been barred, by delayed enrollment, from voting in the June 1972 primary election.

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*Special enrollment was available to every individual in New York State who was eighteen, nineteen, twenty or twenty-one during 1971, because of the passage of the Twenty-Sixth Amendment to the United States Constitution, thus each of these three age groups attained voting age after the preceding general election.

Statement of the Case

The petitioners seek to challenge New York State's closed primary election system. A closed primary is one in which only the *bona fide* members of a political party may participate in that party's primary election.*

New York State utilizes the method of delayed enrollment in that a person who enrolls must wait until after the next general election for such enrollment to become effective, Election Law §186. If, however, a person is eligible for special enrollment, Election Law §187, the person's enrollment is effective immediately.

Enrollment in a political party is a qualification in order to: vote in a party's primary election; sign, and to be a subscribing witness to, designating petitions which place a candidate on the primary election ballot, Election Law §§135, 136; enrollment is also a qualification for most candidates in a party primary election, Election Law §137. This latter qualification can be waived, Election Law §137(4). (Candidates not only appear on the general election ballot by winning a party's nomination at a primary election, but candidates may also appear on the general election ballot by the means of independent nominating petitions, Election Law §138).

Petitioners are duly registered voters in New York State and they registered after the 1971 general election when registration reopened on December 1, 1971. They also enrolled at that time and then completed enrollment blanks which were deposited in a sealed box pursuant to Section 186. Each petitioner could have registered and enrolled prior to the 1971 general election so that they would have

*The methods of determining party membership vary from state to state, see V.O. Key, *Politics, Parties and Pressure Groups*, 5th Ed. (1964) 389-392.

been eligible to vote in the 1972 New York State Primary Election. Three days after the *Rosario* petitioners registered, they filed their complaint herein and two days after petitioner *Eisner* registered, he filed his complaint.

This action was originally sought to (a) convene a three judge District Court, (b) declare Section 186 of the Election Law unconstitutional, and (c) grant plaintiffs (petitioners herein) appropriate equitable relief. Rosario complaint, Append. 6; Eisner complaint, Append. 10-11. A claim was also made in regard to the unconstitutionality of New York State's absentee ballot procedure, because it did not apply to primary elections. This latter claim was formally dropped, as it was the sole issue in another case in the Eastern District, N.Y. *Fidell* v. *Board of Elections of the City of New York,* 71C 1577—(three-Judge Court.) On the return date of the motions in the District Court on December 17, 1971, the petitioners dropped their request for injunctive relief and agreed that the action would be "solely one for declaratory judgment." *Decision and Order of the District Court,* Append. 50-51.

The class action aspect of this case is ambiguous. No claim for class action relief was present in the *Eisner* complaint, although the *Rosario* complaint did, but the relief for such request was never pressed. Moreover, no evidence was submitted to the District Court to support a finding that *Rosario* was a class action under Rule 23 of the Federal Rules of Civil Procedure. Nor was such a determination by order made as is required by Rule 23(c). Judge Mishler began his opinion, however, by stating:

> "Plaintiffs in these class actions [*sic*] represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so." Append. 22.

This latter statement served only to confuse the scope of Judge Mishler's decision inasmuch as it does not include newly arrived residents of New York State (see *Jordan* v. *Meisser*, 405 U.S. 907, 30 L. Ed 778), nor does the statement include voters who were already enrolled but who desired to switch their party enrollment. Yet Judge Mishler concluded his opinion by granting judgment in favor of the plaintiffs and declaring §186 unconstitutional without any qualifications. The Court of Appeals did not go into the class action question as their decision upheld §186's constitutionality.

On February 10, 1972 Judge Mishler handed down his opinion, which declared that Section 186 of the New York State Election Law was unconstitutional. (App. 21-45)

On February 22, 1972 a stay was granted by the Second Circuit and argument on the expedited appeal was set for February 24.

On April 7, 1972, the panel of the Second Circuit, which consisted of Judges Lumbard, Mansfield and Mulligan reversed the District Court and ruled that Section 186 was constitutional. (App. 64-73) Petitioners' application for a rehearing *in banc* was denied April 24, 1972 with Judges Oakes, Feinberg dissenting. On April 26, 1972 Mr. Justice Marshall granted a temporary stay pending consideration by the full Court.

On May 30, 1972 the petition for writ of certiorari was granted and the motion for summary reversal was denied; a motion for expedited relief was denied with Mr. Justice Stewart dissenting and the application for a stay was denied with Justices Douglas, Brennan, Stewart and Marshall dissenting.*

*The New York Court of Appeals last considered the constitutionality of Section 186 on June 14, 1972, in *Vann* v. *Duberstein*, 30 N.Y. 873, which affirmed the decision of the Appellate Division, of the Supreme Court, 39 A.D. 2d 930 (2nd Dept.) The Court affirmed for the reasons stated in the United States Court of Appeals decision herein.

Summary of Argument

Petitioners lack standing to challenge all aspects of delayed enrollment. No proper finding of class representation was ever made pursuant to Federal Rule of Civil Procedure 23(c). For the aspects of delayed enrollment which petitioners can challenge, the matter is moot.

The petitioners had sufficient opportunity during 1971 to enroll but failed to do so; they have lost their right to challenge delayed enrollment.

The predominant method of nominating a candidate for general office in New York State is the primary election. To insure that only *bona fide* political party members participate in that party's primary, delayed enrollment has been a longstanding requirement. Due to the current existence of a four party system in New York, there is a continued need for delayed enrollment to maintain the integrity of the two minor parties. A suggested alternative to delayed enrollment proves, upon analysis, to be a harsh and questionable alternative.

Under any constitutional test, delayed enrollment is valid although the compelling state interest test should not be applied since it has never been used in determining a primary election case.

Delayed enrollment does not require previous participation in any election, nor has it been proved that delayed enrollment has a disproportionate effect on any class or group. The concept of a "grandfather clause" is, therefore, not applicable.

The petitioners do not factually present the issue of the right to travel. Delayed enrollment, moreover, is different from previous right to travel cases in that it focuses on the passage of an event (a general election) rather than on a fixed time period (waiting period).

POINT I

Petitioner's standing to challenge delayed enrollment is limited to their factual situation, which in turn is moot.

The petitioners, in seeking to have Section 186 of New York State's Election Law declared unconstitutional *in toto*, go far beyond the manner in which Section 186 affects them. The claim is made that petitioners represent "newly enfranchised voters", yet this could not be correct as individuals in New York State who have attained voting age since the last general election are eligible for special enrollment (Election Law §187(2).

Nor is the petitioner's right to travel, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Dunn* v. *Blustein*, 405 U.S. 330 (1972) affected by Section 186. Although delayed enrollment applies to recently arrived residents of New York State, none of the petitioners falls in that category (indeed no such claim is even made, Petitioners Brief, 8 n. 4).

Having been New York State residents for the entire period relevant to this case (petitioner Eisner has resided in New York for at least 15 years), no infringement on any petitioner's right to travel has been presented to this Court.

No claim is made that petitioners either have moved from one county to another county within New York State or between New York City and another New York county —moves which would bring them under the aegis of delayed enrollment for the purposes of voting or being a candidate in a primary.* See *Rogoff, et al* v. *O'Rourke, et al*, 29 N.Y. 2d 664 (1971) (allowed inter-county migrants

*Intra-county migrants are allowed to transfer their enrollments, Election Law §386, or to specially enroll, Election Law §187 2 (c) §6.

to be the subscribing witness to designating petitions which are circulated to place a candidate on the primary election ballot, Election Law §§135, 136). Nor do petitioners fall in the class of individuals who seek re-enrollment, because after having changed residences, they had failed to transfer their enrollment, see *Addabbo* v. *O'Rourke and Friedman,* 27 N.Y. 2d 645 (1970), *app'l dismd sub nom. Friedman* v. *O'Rourke,* 400 U.S. 884 (1970).

Finally petitioners do not claim that they have attempted to change their enrollment from one party to another.

Assuming that the procedural and evidentiary objections to the class action aspect are suspended for the moment, the petitioners still cannot, logically, represent a class to which they do not belong. The previous discussion demonstrates the various effects which §186 has upon different groups of New York State residents; petitioners simply have not experienced such effects.

From this discussion of non-representation, it can be seen that there are many effects of delayed enrollment which are not presented to this Court. For such issues, it has been recently said:

> "This Court recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in *cleancut and concrete form*'... Problems of prematurity and *abstractness* may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."
> *Socialist Labor Party, et al* v. *Gilligan,* U.S. 32 L. Ed. 2d 317, 321-322 (Cases cited omitted). (Emphasis added), (1972).

Consideration of delayed enrollment should be limited to the factual situation presented to this Court.

In regard to the class in which the petitioners are situated, namely, those who were eligible for special enrollment but who waived such right, the issue is now moot. The completed enrollment blanks of the petitioner were removed from the sealed box on November 14, 1972* and they are now entitled to full participation in their political party's primaries:

> "The case has therefore lost its character of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969)

And even *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), does not allow a case of this nature to be heard ("the problem is therefore capable of repetition, yet evading review", 394 U.S. at 816) since *Moore* was also heard for a second reason. The Court determined that there was a "continuing controversy in the Federal-State area where our 'one-man, one vote' decisions have thrust" (at 816.) These *two* reasons are not present in the instant case. And in *Moore*, the same restriction which adversely affected the appellant originally was capable of affecting him again, *Hall* v. *Beals*, *supra*, 49. Here, instead, petitioners will not be barred from future participation in a political party. (But see *Dunn*, *supra*, 332, n. 2.)

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*In fact, once the June, 1972 primary occurred, the petitioners had experienced §186's full effect. There would be no need for party enrollment until the 1973 primary, thus the mechanics of opening the "box" have no actual effect on the eligibility of the petitioners.

POINT II

The Petitioners have waived their right to challenge delayed enrollment.

Prior to the enactment of Permanent Personal Registration (PPR), New York had employed an annual registration system in that all individuals, in order to be able to vote at the general election and to be able to vote at the primary succeeding the general election, were required to register anew each year. Two main criticisms were leveled at this system. First of all, there was enormous inconvenience to a voter who had to duplicate his efforts each year merely to cast his vote. Secondly, there was overwhelming work for a Board of Elections. Under a system of annual registration (which had been used in over half of the election districts in upstate New York) often there was insufficient time to complete an updated voter list. Under such system, "In 1950, registration in 10 of the 57 upstate counties of New York exceeded the number of citizens 21 and over as reported by the census. In another 11 counties, registrants numbered between 90 and 100% of the citizenry of voting age." V.O. Key, *Politics, Parties and Pressure Groups,* 5th ed., 1964, 629, n. 7.

New York adopted the reform of PPR in 1967. The driving idea behind the change was that it is the voter who would benefit from a registration system and an enrollment system which would make it easier for a voter to register and remain so registered and to enroll and to remain so enrolled. Under this system, an individual's opportunity to participate in an election was greatly increased. Moreover, there was more time for election officials to complete the checking and purging provisions of the Election Law in order to prevent any abuses which might occur. Even now, however, new registrations pres-

ent a formidable work load for a Board of Elections. For instance, Nassau County had over 100,000 new registrations in 1971.

Under Permanent Personal Registration, with voters remaining on the books from year to year, election officials are better able to purify registration lists. This can be accomplished in a number of ways. First, there is the annual postcard check, Election Law §394. This section requires the Board of Elections to send a postcard with voting and polling place information to each listed voter. Whenever a card, that has been mailed to a registered voter, is returned to the Board of Elections as undeliverable, then the Board must cancel forthwith the registration and the enrollment of the individual whose name appeared on the card, Election Law §394(3).

The ability of the Board of Elections to utilize the police investigation, Election Law §399, is also strengthened under Permanent Personal Registration, simply since there is more time available to carry out this task.

Finally, the failure to vote in a two-year period results in a purge of a voter from the registration and the enrollment lists, Election Law §405, thus dropping voters who have died or have moved elsewhere. (In no instance, however, do these processes cut down the possibility of fraudulent enrollment.)

Permanent Personal Registration, therefore, constitutes a reform over the previous method of registration. So long as the system of voter registration in the United States places the duty to register upon an individual (as opposed to certain other countries where the task of registering is left to the government, *i.e.* Canada and Great Britain, *Hearings before the Committee on Post Office and Civil Service, Voter Registration*, 92nd Cong., 1st sess. on S.1199, S.2445, S.2437, and S.2574

(1971), 267), there is going to have to be effort by the voter to register and to enroll; and there is going to have to be a mechanism whereby fraud and irregularities can be systematically forestalled on an overall basis (as opposed to an individual, case by case basis). Permanent Personal Registration is such a mechanism for registering voters for a general election and delayed enrollment is such a mechanism for enrolling voters for a primary election.

Petitioners herein were eligible to register and to enroll for almost 9 months in 1971, either by personally appearing at Local or Central registration or absentee registration. Such was the finding of Judge Mishler in the District Court, Opinion, Append. 22. For some reason, which has never been explained, the petitioners passed up their opportunity to register and to enroll in 1971.* New York State under permanent personal registration, provided petitioners with more than sufficient time to register and to enroll.

It can only be said, therefore, that the petitioners have waived their right to challenge delayed enrollment as set forth in section 186.

The New York Court of Appeals has stated in regard to a similar challenge to the duty imposed by the State's Election Law that:

> "The franchise conferred by the [N.Y.] Constitution gives rise not only to a right but also a duty, and this statute [Election Law §138] merely attaches reasonable consequences to the non-performance of that duty in the interest of administrative necessity." *Matter of Davis* v. *Board of Elections,* 5 N.Y. 2d 66,69 (1958).

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*Not only would the petitioners have been eligible for the 1972 primary but, as they were eligible for special enrollment in 1971, they could have, if they had timely registered and enrolled, participated in the September 14, 1971, primary.

In the face of this established duty, the petitioners offered no reason in the courts below as to why they failed to exercise the duty imposed upon them by the statutes to timely enroll. From this silence, there can be an inference, if not an absolute conclusion, that their admitted failure to enroll during 1971 was a knowing waiver of their right to become eligible for the June 1972 primary election. This "knowing, intelligent" waiver of the right to enroll now bars petitioners from asserting that their constitutional privileges have been abridged. *Brady* v. *United States*, 397 U.S. 742,748 (1970).

POINT III

The Function of Delayed Enrollment in New York State is essential to the Primary Election System.

A. Development

Prior to use of primary elections, a political party utilized committees, conventions or caucuses to select its nominees for office in a general election. Although New York State still utilizes committees (Election Law §131[1]), conventions (Election Law §132) and caucuses (Election Law §146), the predominant method of nominating party candidates is by direct primaries (Election Law §136[6]).

Only those who are enrolled members of a political party may vote at that party's primary (Election Law §131).

In 1898, the first comprehensive primary statute was enacted (Law of March 29, 1898, ch. 179 [1898], N.Y. Laws 331-359), although this was limited to certain offices and geographical areas. In 1911, a modern direct primary statute was enacted (Law of October 18, 1911, ch. 891 [1911], N.Y. Laws 2657-2726).

The qualifications for party enrollment were set forth in the 1898 law in almost the identical fashion as are the present qualifications (Laws of 1898, supra, ch. 179, §3). An individual's opportunity to register and enroll was different, however, since the annual registration could occur each year on only four days ("meetings") every fall (the equivalent of the current "local registration days"), while enrollment could occur on the four registration days or, initially, during certain supplemental periods*.

When the first comprehensive primary law was enacted in 1911, it stated:

> "§19. No voter who has once enrolled in a political party shall be permitted to enroll in another political party before the first day of the next registration." L. 1911, ch. 891.

Supplemental and special enrollments were abolished by the 1911 law although special enrollment provisions were added gradually over the succeeding years.

When enacted, the original delayed enrollment constituted a high hurdle for those seeking both to register and to enroll. Registration days were limited to four, whereas

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*In the 1898 law, the supplemental period for special enrollment consisted of the month of December and the second Tuesday of May, *but only* for previously registered, non-enrolled voters and for those who had come of age. In 1899 (Law of May 2, 1899, ch. 473, N.Y. Laws 968-998), this was broadened to June and May of each year, together with February in a presidential year. However, the proviso was added that "no elector who has once enrolled in a political party shall be permitted to enroll in another political party before the first of the next four days of registration." §3(9).

Presumably, certain enrollment abuses began to occur as the Laws of 1904, ch. 350, provided judicial procedures to cancel enrollments because of false declarations, death or change in residency. This law applied only to New York City. In 1905 (Laws of 1905, ch. 111), the special enrollment periods of May and June were ended in New York City; and for second-class cities, the same was done in Laws of 1905, ch. 674.

By 1911, no special enrollment time periods remained, but in the next few years certain ones were restored. See 1915 Op.Atty Gen. 328.

now we have both local registration and central registration (which was begun in 1928 for 2½ months per year ([Laws of 1928, ch. 815]). Central registration was gradually extended so that now it is available from 30 days after a general election and continues until the September 1st preceding the next general election, except for 10 days prior to and 5 days after a primary election.*

Delayed enrollment, when enacted, presented another hurdle in that *annual* registration and enrollment for each and every voter was required. Now, of course, New York has universal Permanent Personal Registration, so that the only effort required of an individual, once he has initially registered and enrolled, is to vote once every two years.

B. The Purpose of Delayed Enrollment

New York's procedure for delayed enrollment prevents a politician from trying to "successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary." *Opinion of the 2d Circuit*, Append. 70. Allowing enrollment during any period after the general election would, however, permit such raiding as voters would not be asked to do two contradictory things at once. Prevention of party raiding enables members of one party to feel assured that their nominee will truly represent the electoral consensus of all that party's members. Prevention of party raiding prevents another party from seeking to assure the nomination of a weak candidate who can be defeated in a general election. Delayed enrollment also allows a maintenance of orientation which differentiates between the two parties. One commentator has suggested that politi-

*By *Bishop v Rockefeller*, No. 71C 1088 (E.D. N.Y. 3-judge court 9/7/72, involving both the Nassau County Board of Elections and the New York Attorney General, central registration is to remain open until September 23, 1972, for 4 business days per week.

cal parties should not only have some discretion in order to determine how their convention delegates will be apportioned, see: *O'Brien* v. *Brown*, 41 U.S. L.W. 4001 (U.S. July 7, 1972) but that they should also have some discretion to determine who may participate in their processes.* This is done in New York by delayed enrollment.

The New York system of delayed enrollment is dependent upon events, *i.e.* the occurrence of a general election, rather than on a fixed time period, *e.g.*, a two-year wait. It also sets the minimum number of events which must occur, *i.e.*, only one primary. New York's statute thus presents far less of a resulting time period than the 4 years which have been upheld by this Court in *Lippitt* v. *Cipollone*, 404 U.S. 1032, *aff'g*, 337 F. Supp. 1405 (N.D. Ohio 3-judge court 1972); or the two years set forth by Illinois (*Bender* v. *Ogilvie*, 335 F. Supp. 572 [N.D. Ill. 3-judge court 1971]); *Pontikes* v. *Kusper* — F. Supp. — (N.D. Ill., 3/9/72); or the two successive primaries which are required in New Jersey (*Nagler* v. *Stiles*, 343 F. Supp. 415 [D.N.J. 1972]).

New York State does not desire to prevent party membership changes since that is a most legitimate goal for a citizen to have; yet there is a compelling need to have this done in an orderly manner. The alternative cited by the petitioners will be shown to be no alternative at all. The petitioners, furthermore, have not suggested any alternatives besides the use of Election Law procedure §332. The removal of the right of New York State to have delayed enrollment would have a deleterious effect on the vigorous 4-party system which the state now enjoys.

There is strong motivation currently for party raiding to occur in the State of New York. The nomination of the minor parties at times serves as the vehicle to

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*See Note, *Bode* v. *National Democratic Party. Apportionment of Delegates to National Political Conventions*, 85 Harv. L. Rev. 1460, 1470.

achieve major elective posts in New York State. In 1969, John V. Lindsay, who lost the Republican party nomination in a primary, was still able to become Mayor of New York City because of his Liberal party nomination. In 1970, James Buckley, the nominee of the Conservative party, was elected United States Senator from New York State.

Currently the New York State Assembly which consists of 157 seats is almost evenly divided between the two major parties. Every two years it is a question who will be the majority party; usually, only a few Assemblymen make the difference. Minor party endorsements play a large and significant role in this balance of power. Examination of the vote for Assemblyman in one Nassau County district illustrates this point.* The 18th Assembly District of Nassau County, which in 1970 basically was comprised of the northwestern portion of Nassau County, contained 24,838 enrolled Republicans, 21,491 enrolled Democrats, 485 enrolled Conservatives and 526 enrolled Liberals. The total number of registered voters was 58,031, of which there were 10,741 blank (*i.e.*, declined to enroll), void or missing enrollments, leaving a total of 47,290 enrolled voters. In November 3, 1970, 52,505 voters entered the general election voting booth of whom 48,289 cast a ballot for one of the nominated assembly candidates. The results of the election were:

Vincent R. Balletta, Jr.	Republican	21,696
Irwin J. Landes	Democratic	19,624
Nelson J. Gammans	Conservative	4,307
Irwin J. Landes	Liberal	3,661

*All statistics are taken from the *Annual Report of the Board of Elections, County of Nassau, 1970*. The enrollment statistics are those enrollments as of February 1, 1970, which were reported to the Secretary of State of New York. They do not reflect special enrollees who would have been eligible for the June 23, 1970, primary. However, since we are dealing here with the magnitude of the numbers involved, such statistics are valid.

Thus, the Liberal nomination of Irwin J. Landes was critical to victory and the failure of Vincent Balletta to gain the Conservative Party nomination was instrumental in his loss. Moreover, it can be seen that the power of each of the minor parties, despite its paucity of enrolled voters in such party, is magnified many times at the general election.

It is even more interesting that the victor in the general election won his Liberal designation in a primary where only 213 votes were cast, of which Irwin J. Landes received 119 write-in votes, Jack Tenzer received 32 and other candidates received 2 votes. After a judicial challenge on the results (*Tenzer* v. *Meisser,* Sup. Ct. Nassau Co. 1970, Index No. 6851/*aff'd,* 35 A.D. 2d 670), the Supreme Court, Nassau County, found that 20 for Landes and 3 votes for Tenzer were irregular, but that such changes were insufficient to change the result of the primary. Thus, a difference of 10 votes in the primary ultimately determined 3,661 votes for Landes on the Liberal line at the general election, and was the key to his victory. The incentive for party raiding which is present, in the face of such statistics, is obvious.

Other Assembly races in Nassau County also involved a minor party nomination which proved the key to either defeat or victory, while in still other races, a minor party nomination played no part in the result, *e.g.,* the 12th Assembly District, Joseph M. Margiotta, who received a plurality of 18,839 votes.

Minor party nominations were not only the key in Assembly races, but also they figured prominently in the Nassau County State Senate races. In the 7th District, State Senate, the Republican victor, Norman Levy, gained

*When a "petition for opportunity to ballot in a primary election" (Election Law §148) is filed, the enrolled voters of a party may write in any individual's name, even a non-party member such as Mr. Landes who was an enrolled Democrat.

his victory as a result of almost 13,000 votes on the Conservative line and was thus able to overcome his Democratic opponent's 57,435 votes. In both the 4th Senatorial District and the 5th Senatorial District in Nassau County, had the Democratic nominee also had the Conservative nomination, it would have been victorious. Here again, in certain districts, the minor party nomination was not a factor, *e.g.*, in the 6th District, John R. Dunne, received a plurality of just over 40,000 votes.

The same analysis holds true for U.S. Congressional races, *e.g.*, Rep. Norman F. Lent defeated Allard K. Lowenstein by 93,824 votes to 84,738. Congressman Lent had the Conservative Party nomination and received 23,856 votes on that line. (Lent won the Conservative primary election because the other person seeking the Conservative nomination had had his petitions invalidated by the courts. *Lent* v. *Farrell*, 34 A.D. 2d 978 [2d Dept. 1970].)

From these examples, the motive for party raiding is clear, and on all levels of government in New York State. It can also be seen that it is the low number of enrolled minor party members in Assembly, Senate and Congressional districts which presents the possibility of raiding — not just the state-wide enrollment figures which show that both the Liberal and Conservative parties have slightly over 100,000 enrollees.

C. Which is the least drastic alternative?

Presently two statutory means exist to prevent party raiding. The first is the delayed enrollment procedure. The second is the procedure established by Election Law, §332, whereby an individual's enrollment may be challenged, and if a hearing upholds the challenger's contentions, the individual may be purged from the party rolls, subject to judicial review. The use of §332 is cited by the petitioners as the "least drastic alternative" to the wider scope of delayed enrollment. *Matter of Zuckman* v. *Dono-*

hue, 191 Misc. 399, (Sup. Ct.), *aff'd,* 274 App. Div. 216 (3rd Dept.), *aff'd without opinion,* 298 N.Y. 627, 81 N.E. 2d 371 (1948); *In re Mendelson,* 197 Misc. 993 (Sup. Ct., 1950); *Matter of Werbel* v. *Gernstein,* 191 Misc. 274, (Sup. Ct. 1948); *Greenberg* v. *Cohen,* 175 Misc. 405 (Sup.Ct., 1940); *Matter of Newkirk,* 144 Misc. 765 (Sup. Ct., 1931).

Judge Mishler stated that the §332 procedure is "highly effective even on short notice before a primary." Append. 37. However, in the Court of Appeals decision, Judge Lombard noted:

> "Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, *e.g.,* ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent."

Two points should be made in light of Judge Lombard's concise summary of §332. The first point demonstrates that if §332 were to be the sole method of preventing party raiding, then its application would be so harsh on an individual's rights that it would probably be unconstitutional; and the second point indicates, through an analysis of one of the above cited raiding cases, how such an abuse of §332 would occur.

Under §330 of the Election Law, a procedure is set forth for legal challenges to the designating petitions which are required to place a candidate on the primary ballot. Each year the Courts of New York are deluged by Election Law cases brought on by primary candidates who seek to invalidate their opponent's designating petitions. If this can be done, the petitioners will win their party's nomination, because Election Law §149 provides, in essence, that an individual is deemed nominated if his petitions are the only valid petitions filed for a vacancy to be filled at a primary. Thus, the legal proceedings can result in gaining a party's nomination without having to run a campaign. Many times these legal challenges are initiated as a political strategy in order to tie up the supporters of a candidate in the courtroom while his opponents are out campaigning.

When §332 is examined, it is obvious that it is another potential weapon with which to fight an opponent in a campaign. Moreover, unlike §330 cases, a §332 case can tie up the opponent himself for extended hearings, both in Court and before the initial committee which considers the question of a valid enrollment. See *In re Mendelson, supra, supplemental opinion.*

A §332 proceeding is far more draconian than a §330 proceeding in that it attempts to delve into an individual's tenets and political principles. Thus, §332 is capable of being a chilling instrument of abuse by the "regular organization" of a political party which is engaged in a fight against genuine party insurgents.* This abuse is a reality, as evidenced by a series of cases which have arisen under this section. *Sullivan* v. *Power*, 24 A.D. 2d 709, *aff'd*, 16 N.Y. 2d 854, 210 N.E. 2d 652 (1965) (see the Appellate Division); *Lake* v. *Power*, 9 A.D. 2d 997, *aff'd*, 5 N.Y. 2d 755 (1958; *Rhatigan* v. *Power*, 282 App. Div. 838 (1953); *Scarfone* v. *Ruggiero*, 277 App. Div. 931 *aff'd*, 301 N.Y. 662, 93 N.E. 254 (1950); *Matter of Titus*, 117 App. Div. 621 (1907); also see the series of cases reported as Matter of *Goldshein* v. *D'Angelo*, 34 A.D. 2d 991 (1970).

*Moreover, who is to decide in such a case as to what are the true ". . . principles of the party . . ." Election Law §174.

The second point demonstrates that even in the case where §332 was used to stop party raiders, §332 turned out not to be "highly effective", as Chief Judge Mishler contended. In 1931, certain Democrats in the City of Utica, New York, sought to raid the Socialist Party in that city in order to gain the Socialist nomination for candidates who already had the Democratic nomination. *Matter of Newkirk, supra.* There, approximately 75 individuals had, during 1930, decided to raid the Socialist Party. This was not discovered until the August, 1931, preceding the fall primary. The Chairman of the Socialist Party of Oneida County, after receiving a challenge to the 75 enrollments, appointed a subcommittee pursuant to §332 to make an initial determination. After reviewing the report of the subcommittee, he found that 21 purported enrollees had signed written renunciations of their enrollment, and that an additional 47 enrollees were not valid. Thereafter, judicial review was sought and the Court upheld the County political chairman's determination in 27 of the 68 cases. Of those who had not signed renunciations, however, the Court upheld only nine of the cancellations. Approximately 79% (38 individuals) of the political Chairman's determinations, for those who had not signed renunciations, were found to be erroneous.

There are three inferences which could be drawn from this case. First, §332 is not a viable means to prevent party raiding; or second, §332 is unworkable inasmuch as the evidence required, (*i.e.*, an individual's intent,) "is in practice unworkable." *Swift & Co.* v. *Wickham,* 382 U.S. 111, 123, *opinion* Harlan, *J.* (1965); or third, the county political chairman in *Newkirk* was engaging in the very abuse of §332 described above.

Thus, Election Law §332 sets forth a proceeding which has a number of drawbacks. First, it requires an extraordinary amount of money, time and manpower; second, it requires an examination into an individual's intent — a

process fraught with the potential for chilling the right of free speech; and third, it is a likely instrument for abuse. Indeed, it is a logical conclusion that a §332 proceeding is an invasion of an individual's constitutional rights than is the conclusion that §186 is unconstitutional.

POINT IV

Delayed Enrollment is Constitutional under either the Rational Basis Test or the Compelling State Interest Test.

The initial issue which must be decided by this Court is which constitutional test is to be applied to the New York State enrollment statutes. In dealing with a state primary election where suspect class, race or wealth discrimination is absent* and where there is a vigorous two-party system, the applicability of the compelling state interest test is tenuous, both in light of the facts and the precedents.

The compelling state interest test is one which gained its present status literally by its own bootstraps. *Dunn* v. *Blumstein, supra,* Blackman, *J.,* concurring opinion; see *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969), Stewart, *J.,* dissenting opinion at 639.

The compelling state interest test came into full force for Election Law cases in *Kramer, supra.* The majority in *Kramer* (opinion by Justice Warren) relied upon the court's previous opinion in *Carrington* v. *Rash,* 380 U.S. 89 (1965), opinion by Justice Stewart. In *Kramer,* however,

*The *White Primary* cases and *Bullock* v. *Carter,* 405 U.S. 134 (wealth), involves those areas which have traditionally been protected by constitutional safeguards. In the case herein, those cases cannot be used to mechanically apply constitutional principles applicable in general elections to primary elections free from the onerous taint of race, wealth or class discrimination as there is an inherent discrimination (party memebrship) involved in a closed primary system and some method is necessary to establish party membership.

Justice Stewart dissented on the ground that the classification therein was rationally related to a permissive legislative end. Moreover, in enunciating the compelling state interest test, *Kramer, supra,* at 627, cited *Carrington, supra,* at 96. Yet, *Carrington,* at 96, only found that "states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." (Cases cited omitted.) Thus, *Carrington* found that the Texas Constitution, by absolutely *preventing* a soldier *ever* to controvert the presumption of non-residence, imposed an invidious distinction in violation of the Fourteenth Amendment. There is, therefore, somewhat of a gap between the seed of the test in *Carrington* and the flower of the test in *Kramer.*

Such analysis is of current validity since *Dunn, supra,* restated almost word for word the test set forth by *Kramer.* See *Dunn* v. *Blumstein,* 405 U.S. at —, 40 U.S.L.W. at 4272; *Kramer* v. *Union Free School District,* 395 U.S. at 627.

Although *Kramer* seemed to exempt primaries from the compelling state interest test*, the court below utilized the compelling state interest test in determining that delayed enrollment advanced a valid interest of the state. Yet, the Court of Appeals should not have found it necessary to utilize the compelling state interest test since in *Bullock* v. *Carter,* 405 U.S. 134, 143 (1972), the Court stated,

> "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

And, in this case involving a primary election, the Court of Appeals had the opportunity presented to utilize the *Bullock* exception. The court below was faced with a statute

*"We need express no opinion as to whether the state, in some circumstances, might limit the exercise of the franchise to those primarily interested or primarily affected." *Kramer, supra,* at 632.

which presents an additional voter qualification to the three qualifications upheld in *Kramer* and presents the additional qualification in an election which, by its very definition (closed primary), inherently demands the added requirement.

In *Kramer*, the Court found that states have the power "to impose a reasonable citizenship, age and residency requirements on the availability of the ballot." (Cases cited omitted.) 395 U.S. at 625. However, the instant case, involving a closed primary where only members of a political party may participate in that party's primaries, demonstrates that an additional qualification is absolutely required* to insure that the members are *bona fide*.

Since the case herein does not involve the "denial" of a vote found in Kramer and involves a closed primary election, the compelling state interest test did not have to be used, especially since the test has *never* been used before for a primary election case. Instead, the traditional "rational basis" test could have been used:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice their laws result in some equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961)

The use of this test in *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969) shows the inappropriateness of the compelling state interest

*If such qualification cannot be constitutionally set forth by the various states of the union, then all primaries must be open to the voters of every party. It might be noted that at the 1972 Democratic National Convention, the delegates voted to extend the reforms enacted for the 1972 Convention and to initiate another reform to end the primary election practice of allowing open primaries where Republicans may cross over and vote for Democrats. *New York Post*. 7-12-72, 27.

test herein, especially since the *McDonald* statutes were not shown to be discriminating or *"to have an impact on appellants* ability to *exercise the fundamental right to vote"* at 807 (Emphasis supplied).

Even if the rational state interest test may not be sufficient in this case to strike the correct balance between the interest of the State and the interest of an individual to participate in that primary, this Court could use the "close scrutiny" test set forth in *Bullock, supra*:

> "[T]he laws must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at—, 31 L. Ed. 2d at 100.

Under either standard, the constitutionality of §186 is clear as the avoidance of party raiding serves a rational basis of the Legislature and has been shown to be reasonably necessary.

Assuming, *arguendo,* that the compelling state interest test does apply ,and that the *Jordan, supra,* and *Addabbo, supra,* cases do not apply, the decision below should be upheld by this Court.

It has already been pointed out that the recent stringent tests for voting in a general election cannot be mechanically applied to a primary election by citing the previous Supreme Court decisions which involved primaries. In such cases special circumstances were always present.*

*These cases are *Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *United States* v. *Classic,* 313 U.S. 299 (1941); *Grovey* v. *Townsend,* 295 U.S. 45 (1935); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Nixon* v. *Herndon,* 273 U.S. 536 (1927). Even in *Bullock, supra,* there was a suspect classification involved, *e.g.,* wealth. In the one case when this Court did choose to decide upon a provision concerning the rules for a primary election and which did not involve suspect classification of race, wealth or discrimination, the Court upheld a limitation for entering a primary. *Ray* v. *Blair,* 343 U.S. 214 (1952). Yet in *Ray,* however, it was pointed out that the "real election takes place in the [Alabama] primary," so that "limitations as to entering a primary controls the result of the general election." 343 U.S. at 226.

What is at stake herein is the method by which a State political party chooses to protect the integrity of the nominating system that it uses. New York State has four methods: committees, conventions, caucuses and primary elections, with the latter being the predominant. In other states, caucuses or conventions may predominate.*

New York State's deferred party membership provisions were established with the first primary law and remain basically unchanged. Throughout this period, indications of enrollment fraud have cropped up, *e.g.*, the purging provisions of 1904, *supra*, when supplemental enrollment periods still existed and the attempts at party raiding in 1931. *Matter of Newkirk, supra.* Presently, with two key minor parties, Liberal and Conservative, whose nominations are frequently the decisive factor in general elections, the motivation for party raiding is quite strong.

Delayed enrollment is a fundamental element in the enrollment system in order to avoid fraud. Such purpose was upheld by this Court in *Dunn* v. *Blumstein, supra*, 40 U.S.L.W. at 4274 (March 21, 1972). And delayed enrollment is as needed for primary elections just as a voter registration system is needed in general elections; so that the recognition in *Dunn, supra*, of the value of voter registration systems to deter fraud should be extended to similar recognition of delayed enrollment. In *Dunn, supra*, the purpose of preventing "a fraudulent evasion of state voting standards . . . in most . . . states . . is served by a system of voter registration." 40 U.S.L.W. at 4274. Under these conditions, New York State has shown the highest and most compelling need for delayed enrollment.

*See *Irish* v. *Democratic-Farmer-Labor Party*, 287 F. Supp. 794 (D. Minn. 1968), *aff'd*, 399 F. 2d 119 (8th Cir. 1968); 25 Am. Jur. 2d *Elections*, §49 (1966).

POINT V

New York's deferred enrollment system is not a "grandfather clause."

Under New York State's registration and enrollment procedure, there is no requirement that the petitioners had to be involved in the 1971 elections whatsoever. The petitioners, however, contend under New York State's election statutes that "the petitioned [had] to have been registered to vote in the 1971 local elections." Petitioners' Brief, p. 42. Instead, under the provisions of permanent person registration, Election Law, Article 15, once an individual has registered to vote and has enrolled in a political party, such registration and enrollment continues so long as a person votes in a general election "at least once in each period of two successive calendar years." Election Law §352. Permanent personal registration was adopted throughout New York State in 1967, Election Law, §350(2), although certain counties, *e.g.*, Nassau County and the five counties which comprise New York City, adopted permanent personal registration during the early fifties. Thus, the petitioners were merely required to register and to enroll during 1971; they were not required to participate in the 1971 elections.

The petitioners misconceive the workings of delayed enrollment; in no instance is participation in the 1972 primary election conditioned upon past participation in the 1971 elections.

A. Delayed enrollment and grandfather clauses

The relation of a grandfather clause concept to delayed enrollment is an illogical attempt to apply past decisions of this Court to the instant matter. Delayed enrollment applies equally to all individuals. There is no ancestry provision, either implicit or explicit, in its operation. Past

decisions of this Court, such as *Guinn* v. *United States*, 238 U.S. 347 (1915); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Meyers* v. *Anderson*, 238 U.S. 368 (1915) and *United States* v. *State of Louisiana*, 380 U.S. 145 (1968), show that the effect of a grandfather clause was unequal in its application to the electorate in general.

To cloak delayed enrollment with the threads of the term "grandfather clause" is to overlook the goals and legal application of delayed enrollment.

It has already been outlined that enrollment and registration are separate processes. The petitioners have used statistics which stem from participation in the 1968 general elections in an attempt to claim a "disproportionate effect on minority groups by delayed enrollment." The fact that less than 50% of the qualified voters in the Counties of New York, Kings and Bronx participated in the 1968 general elections (statistics compiled pursuant to the 1965 Voting Rights Act, 42 U.S.C. §§1973), bears no logical connection to delayed enrollment. Conceivably, a defect could exist in the voter registration system and thus lead to the low voter turnout. Equally likely as an inference, however, is the premise that there is a defect in the system used for physically casting one's ballot at the polling place. Other inferences are also possible, *e.g.*, rain or a damp overcast sky, on the day of general election lowered voter turnout. Even to grant the presence of some defect in the registration or general voting system, though, does not lead to any conclusion with regard to delayed enrollment, since the enrollment process is separate from the registration process. The petitioners' contentions in this regard are, therefore, not valid.

The fallacy in the petitioners' argument is pointed out by another line of thought. An individual, duly registered and enrolled under permanent personal registration for calendar year 1968, could have failed to cast a ballot in

the 1968 general election. Thus, he would be included in the statistic that fewer than 50% voted in the 1968 election. Yet, this same individual could have remained eligible, both to vote in the forthcoming 1972 general election and in the June 1972 primary, by having cast a ballot in the general elections from any of the aforementioned counties, thereby fulfilling the permanent registration requirement of voting once every two years.

The conclusion to be drawn from this analysis is that delayed enrollment has not been demonstrated, either logically or by evidence to have a disproportionate effect on minority group participation in the primary election process.

The petitioners have also failed at any point throughout this case to demonstrate that delayed enrollment has a deleterious effect on the turnout for a primary. In fact, the experience over a long period of time would weaken the petitioners' case if it had been raised.

Participation in the nomination process (*i.e.*, the basic *raison d'etre* for primaries) has historically ranged between 25 and 30% of the electorate. Such studies are based on actual voter turnout and opinion surveys. Leiserson, *Parties & Politics*, 1958, pp. 147 and 294. Such studies also reveal that voter turnout in the primaries varies significantly in terms of the strength of the two major parties in a state; so that as one party over a period of years becomes dominant within a state, the percentage of individuals voting in the primary of the weaker party declines, while at the same time there is a corresponding increase in the percentage in the primary of the dominant party. *Leiserson*, p. 147, citing V.O. Key, *American State Politics*, 1956, pp. 99-118. We can draw the conclusion that delayed enrollment does not play a part in such turnout.

POINT VI

Delayed enrollment does not abridge the right to travel.

This Court has recognized that freedom to travel is a right protected by the Constitution, *Shapiro* v. *Thompson*, 394 &.S. 618 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274 (1972). Delayed enrollment under Election Law §186 is not a durational residency requirement such as was encountered in *Dunn, supra.*

It has been shown previously that the petitioners do not present a right to travel controversy to this Court because they have never lacked residency in New York for the time period applicable to this case. This claim of an abridgement to the petitioners' right to travel could only be brought forth by an individual who is a recent New York State resident or who has moved from one county to another since the last general election. This claim was present in a case previously brought by the same attorneys, *Bachrow* v. *Rockefeller*, 71 C 930 (E.D.N.Y. 9/8/71, three-judge Court).

Bachrow was dismissed as moot, as there were no primary contests in which the plaintiffs therein could vote. Moreover, this Court has considered the very issue of a recently arrived New York State resident and dismissed the case for want of a substantial federal question in *Jordan* v. *Meisser*, 405 U.S. 907, 30 L. Ed. 2d 778 (1972)

The dismissal in *Jordan* was on the merits and controls in regard to a recently arrived New York resident, Stern and gressman, *Supreme Court Practice* 4th Ed. 1969, §5.18 at 233. Furthermore, since Wayne P. Jordan was not eligible for special enrollment under §187, he then fell under the rule of delayed enrollment of §186 (*i.e.*, if one

is not eligible for an exception to the general rule, the general rule applies). Thus, *Jordan* not only is precedent for this point, but also is precedent for the entire case.*

In the decision of the District Court, Chief Judge Mishler found that both the Voting Rights Act Amendments of 1970 invalidated durational residency requirements and that delayed enrollment fell under this prohibition. The Court of Appeals correctly reversed this holding, finding that the abolition of durational residency requirements in 42 U.S.C. §1973 aa-1(d) referred solely to general Presidential elections and not to primary elections. *Rosario, supra,* 654.

In *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), the prohibition of durational residency requirements by the Voting Rights Act Amendments of 1970 was upheld. Nowhere in *Oregon's* various opinions did the Court pass upon presidential primaries, since they were obviously not included in the 1970 Act.

Congress, moreover, did not intend primary elections to be included under the purview of the durational residency prohibition for a very practical reason. Presidential primaries are conducted, in the several states of the Union from February (New Hampshire) to June (New York and

*The effect of this Court's dismissal in *Jordan* v. *Meisser* has been the subject of debate in this case, inasmuch as the MOTION TO DISMISS OR AFFIRM by the Attorney General of the State of New York had inadvertently asserted appellant Jordan's right to special enrollment (Election Law §187[2][c], (in direct contrast to the specific holding in the New York Supreme Court's opinion), whereas the MOTION TO DISMISS OR AFFIRM by the County Attorney of Nassau County correctly cited the bar of Election Law §187(6) to the right of Mr. Jordan to specially enroll. During argument before the Court below, the Nassau County Attorney not only informed the Court of the correct interpretation of §187 (Appellee's Brief, p. 39), but the County Attorney also handed to the Court below and to each of the petitioner's attorneys a copy of the *Jordan* MOTION TO DISMISS OR AFFIRM of the Nassau County Board of Elections.

*In 1972, U.S. Senator Hubert Humphrey received more votes from all the presidential primaries than did U.S. Senator George McGovern.

California) during Presidential election years. Short durational residency requirements would allow a relatively small bloc of voters to vote in more than one state's primary election and thereby multiply the psychological effect, that winning or losing by a few thousand votes, has upon the somewhat informal process — and the surely non-systematic method — which constitutes the selection of a political party's nominee for President. It should be noted that the total votes which a candidate receives in all the various presidential primary elections* is not as important as is the number of state presidential primary elections which are won.

Unlike the delay in voting eligibility which is caused by a durational residency requirement, delayed enrollment results in a wait solely from the fact that there is only one primary election and only one general election held each year. Under a durational residency requirement, the wait is a fixed period of time. Under delayed enrollment, the wait can vary in duration from one month to eleven months, District Court opinion, Appendix 45. The delay which results from §186 is therefore inherent in the design of the statute which prevents would-be raiders from doing two things at once. Indeed, the inherent delay can be seen from the fact that it petitioner Eisner had specially enrolled when he first became of voting age on his 21st birthday in December 1970, he would have had to wait over nine months from his enrollment to his participation in the September 14, 1971, primary.

The New York statute therefore does not abridge the right to travel, since it fixes no specific time period. Instead, the duration of any wait is a result of an individual's timing of his enrollment — not of an individual's exercising his right to travel.

*In 1972, U.S. Senator Hubert Humphrey received more votes from all the presidential primaries than did U.S. Senator George McGovern.

CONCLUSION

The opinion and judgement of the Court of Appeals should be affirmed.

Dated: September 14, 1972.

Respectfully submitted

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